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## The Greening of New Jersey's “Brownfields”-As Viewed by the Department of Environmental Protection

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# THE GREENING OF NEW JERSEY'S "BROWNFIELDS" — AS VIEWED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

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## I. OVERVIEW

### A. *This Department's Focus Is On Redevelopment*

In January 1998, New Jersey enacted the Brownfield and Contaminated Site Remediation Act<sup>1</sup> ("Brownfield Act") in order to spur redevelopment and renewal of the State's abandoned and underutilized industrial and commercial properties. Brownfield statutes such as this, together with partnerships and special brownfield initiatives being employed by the Department of Environmental Protection's Site Remediation Program, are actively encouraging remediation and redevelopment of the State's contaminated lands. New Jersey's vision is that these contaminated properties will be remediated and redeveloped so that they can once again be able to provide economic activity, create employment opportunities and draw increased tax revenues.<sup>2</sup>

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1. N.J. STAT. ANN. §§ 58:10B-1 to -31 (West Supp. 1998). This legislation was sponsored by Senator Henry McNamara, Assembly Majority Leader Paul DiGaetano and other legislators, it actually amended and replaced the Hazardous Discharge Site Remediation Act, N.J. STAT. ANN. § 58:10B-1 (West Supp. 1998), and amended the Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1998), and the Industrial Site Recovery Act, N.J. STAT. ANN. § 13:1K-1 (West 1992).

2. See Office of the Governor News Release, N.J., Jan. 6, 1998.

When Governor Whitman signed the Brownfield Act into law, she provided innocent persons willing to remediate brownfields with a sense of comfort and reward for their cleanup efforts.<sup>3</sup> Related brownfield legislation also protects prospective land owners from lawsuits arising from prior contamination.<sup>4</sup> Before this law, liability exposure regarding only certain brownfields located in particular zones was being addressed pursuant to statutory authority,<sup>5</sup> while other sites were being handled by the New Jersey Department of Environmental Protection ("DEP") pursuant to case-specific Prospective Purchaser Agreements. Now, through a comprehensive, ground-breaking statute, New Jersey has invited more new development projects with the enhanced cleanup finality and liability protections embodied in the Brownfield Act.<sup>6</sup> This, in turn, creates more new business. The Act will provide cleaner brownfields and new life everywhere in New Jersey.

As will be discussed in detail below, the 1998 Brownfield Act represents a giant step forward in this State's efforts to address older industrial sites, because the new law provides an increased measure of cleanup "finality" as well as financial incentives for interested developers.<sup>7</sup> The new cleanup finality for a remediating developer should dramatically improve both environmental and economic health in New Jersey cities and other brownfield locations by encouraging more redevelopment efforts.<sup>8</sup> This finality also applies to successive property owners, operators and leaseholders who had no prior hand in causing contamination at

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3. §§ 58:10B-5, -6, -13.1, -15, -28 (providing remediators with potential loans, grants, reimbursements, exemptions from penalties, and covenants not to sue).

4. *See* § 58:10B-5.

5. Sites located in particular areas are still receiving extra assistance of various kinds. *See, e.g.*, the Taxpayers' Relief Act of 1997, Pub.L. 105-34; N.J. STAT. ANN. §§ 58:10B-25 (allowing brownfield redevelopers to receive tax benefits for certain targeted areas).

6. *See id.* at § 58:10-23.11g.

7. *See id.* at § 58:10B-27 to -31.

8. *See generally* N.J. STAT. ANN. §§ 58:10B-1 to -31 (West Supp. 1998). The 1998 law also provides other incentives, including rebates of up to 75% of developers' cleanup costs, in an effort to encourage persons to acquire, remediate, and rebuild brownfields. *See* § 58:10B-28.

a redevelopment site.<sup>9</sup>

Stuart J. Lieberman, a well-known New Jersey environmental and real estate attorney, has found that there are "about 800 eligible locations" for brownfield development in New Jersey. He finds that New Jersey is doing its job to address those brownfields.<sup>10</sup> This most recent common sense dual approach by lawmakers to expedite cleanups and prompt a surge of redevelopment at polluted sites, together with the State's many prior efforts (including the willingness of the DEP, and the Office of the Attorney General to enter into site-specific cleanup agreements with brownfield developers) reflects sensitivity to real issues and dedication to real solutions.

#### B. *Addressing Impediments to Brownfields Redevelopment Through Regulating Fairness*

New Jersey, like other states, finds itself heavily involved in brownfield issues. Many commercial and industrial properties are in need of a face lift — a need that cannot be ignored or avoided. In New Jersey and across the nation, factories, gasoline stations, dry cleaning establishments, chemical storage companies, and even former landfills<sup>11</sup> have been used up. Some of these facilities have simply been discarded. The State's goal is to encourage redevelopment of sites which are currently being avoided; sometimes this is due only to perceived contamination

9. See generally § 58:10B-13.1. See also § 58:10B-27 to -31.

10. See Stuart J. Lieberman, *It's Looking Lots Greener For Brownfields*, 6 N.J.L. 3015 (Dec. 22, 1997).

11. Properties formerly used for industrial or manufacturing practices or waste disposal (even landfills) now unused because of uncertainty over who should undertake the necessary environmental cleanup are considered by some to be brownfields. Brownfields which typically but not always surface in urban areas, have also been described as "sites in need of revitalization" and "environmentally compromised sites." The most notable features of a "brownfield" are a site's former use for industrial or other business purposes, and current underutilization of that property. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789 at 190 n.2 (1985).

or high cleanup costs. The goal to revitalize these properties requires creativity.

For a number of years New Jersey has had a vast body of statutes, regulations and agency practices which effectively address contamination either in the form of pollution prevention or cleanup.<sup>12</sup> However in order to truly promote the reuse of brownfields, the State must also encourage more land investments and redevelopment projects. That effort, which has required not only legislative enactments such as the 1998 Brownfields Act but also innovative decision making by various State departments and other stakeholders, is underway.<sup>13</sup>

Many factors determine the possibility of the successful redevelopment of a particular site. These include insurance and lending issues, location, condition and suitability of the property for a planned development project, contract issues, and numerous risk sharing questions. The DEP often finds itself entrenched in these matters and in the entire redevelopment effort. Building relationships with many different entities (lenders, real estate attorneys, municipal leaders, and a host of others) is something that the DEP finds itself doing on a regular basis. Brownfield "partnerships" can be vital to a site's successful cleanup and development. Faced squarely with the challenge to create a solution for brownfields which can work in the real world, New Jersey has formed partnerships between the private sector and government on many occasions.<sup>14</sup> Although the commitment to form these partnerships seemed at first to be monumental, it has resulted in a renewed interest in cleanup and development of contaminated lands.<sup>15</sup> This allows for an atmosphere from which all New Jersey communities and citizens can benefit.

Some time ago, New Jersey concluded that it should encourage the use of private funds to address contaminated areas

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12. See, e.g., Industrial Site Recovery Act, N.J. STAT. ANN. § 13:1K-6 (West Supp. 1998); Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1998).

13. See *NJDEP Site Remediation Program-Voluntary Cleanup* (last modified July 27, 1998) <<http://www.state.nj.us/dep/srp/cas/volclean.htm>>.

14. See, e.g., *id.*

15. See *id.*

of the State.<sup>16</sup> Since that time, the DEP and the Legislature have been on a quest to remove or reduce major impediments faced by landowners, lenders, and developers who might be willing to invest cleanup dollars. Some critical barriers to brownfield investment and development included fear regarding the cost of site remediation, nagging questions about site conditions, and trepidation concerning liability exposure for already existing site contamination. Recognizing that such unknowns can cause people to avoid acquiring, developing, or remediating a brownfield site, the State has demonstrated sensitivity. As State Legislators and the DEP create ways to cost-effectively, yet safely, manage environmental risks while also providing liability protections and other incentives, a climate of regulatory fairness is forming which allows interested parties to work together to rid New Jersey of brownfields.

Developers are beginning to revisit the many opportunities presented by abandoned brownfield sites with such positive features as prime location, easy accessibility to roadways, transportation, utility lines, and telephone service. Recognizing that many of these sites were initially developed because of such features, developers are now interested in taking advantage of these conveniences through redevelopment.<sup>17</sup> Thus, these underutilized properties are generating new tax dollars and employment opportunities. Developers and those landowners and prospective landowners who have already confronted their fears in order to transform these properties into profitable and useful real estate can testify that rebuilding a brownfield (rather than developing new property) often offers the best answer. They can also attest that New Jersey regulators have been willing to help once a deci-

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16. See Stacie A. Craddock, *A Call for Public Participation in State Voluntary Remediation Programs: Strategies for Promoting Public Involvement Opportunities in Virginia*, 30 U. RICH. L. REV. 499, 499-500 n.3 (1996).

17. The Site Remediation Program at the NJDEP has promised to reuse contaminated sites by ensuring that site remediations approved by the Department will fit within the "overall plan of developers, businesses [and] local officials." NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BROWNFIELDS REUSE-MAKING INDUSTRIAL REDEVELOPMENT A REALITY IN NEW JERSEY. Indeed, this is why the DEP views itself and the regulated community as partners in revitalization.

sion to recycle a 'brown' site has been reached. Not only has the DEP assisted with brownfield remediation and redevelopment projects, but so have many other governmental agencies on every level. Indeed, local governments are well-versed in tax and foreclosure issues, and State agencies have a handle on the environmental conditions and other factors concerning a given development site. Federal agencies have also acted as a partner through pilots by limiting impediments to site cleanup and rebuilding through liability protections and funding.<sup>18</sup>

## II. NEW JERSEY'S COMPREHENSIVE BROWNFIELDS PROGRAM

In many ways, New Jersey is a brave new world for property owners, developers, remediators, and also perhaps regulators, as the doors begin to open to those prepared to take on the challenge of underutilized sites.<sup>19</sup> At the center of that new world is a plan which attracts private dollars for site remediation through incentives for site reuse.<sup>20</sup> This plan works, not only because cleanups are drastically needed in order to improve the value of older industrial and commercial properties, but also because New Jersey has a vested interest in preserving its "greenfields."<sup>21</sup>

DEP's twin goals of encouraging remediation of brownfields and at the same time saving open green space can be seen in New Jersey's Legislative enactments, administrative regulations, and in the practices of State agencies.<sup>22</sup> Merging environmental

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18. See Richard J. O'Conner & LuAnn Pasciak, *Brownfields Perspective* (visited Oct. 26, 1998) <<http://www.rfweston.com/allenv/BROWN/brown.htm>>.

19. See Ronald Begley, *Resurrecting Brownfields*, ENVTL. SCI. & TECH., A226 n.5 (1997).

20. See *Governor Signs Law Creating Incentives for Redevelopment of Vacant Industrial Site*, (OFFICE OF THE GOVERNOR, Trenton, N.J.), Jan. 6, 1997.

21. "Greenfields" are virgin land, open space or property (such as farmlands) not previously used as commercial property. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 791 (1985).

22. For example, in July 1996, New Jersey announced that it and the Office of the New Jersey Attorney General successfully negotiated a prospective purchaser agreement for the cleanup and redevelopment

issues with economic issues can truly work. When virgin land remains untouched while commercial and industrial sites are recycled, a balance occurs under which the State can prosper. Moreover, from the viewpoint of the prospective purchaser or developer, selection of a brownfield as the site for a new business may often be the better, more practical choice when compared with a "greenfield." First, undeveloped or minimally developed properties will often lack the public water, sewer or transportation conveniences so important to new business ventures. Second, any major roadways already existing in a given suburban (green) area of the State were often designed for less dense use, and may therefore not provide sufficient access for the workers, suppliers, and customers of an anticipated new business.<sup>23</sup>

Governor Whitman promised early on to provide a new face for contaminated lands,<sup>24</sup> and the comprehensive brownfields framework now in place is evidence of a promise kept. As the DEP works to implement new statutory and regulatory reforms intended to rid the State of brownfields, greenfields are, in fact, being preserved. The resulting increased interest in rebuilding industrial communities is a true boost for New Jersey.

#### A. *The Department of Environmental Protection's "Voluntary Cleanup Program"*

##### 1. Voluntary Cleanup Commitments From The Private Sector

Under the authority of Assistant Commissioner Richard J. Gimello, the DEP's Site Remediation Program has been facilitat-

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of the abandoned Kapkowski Landfill in Elizabeth so that a major retail shopping mall could be erected to draw revenues and new employment opportunities to the State. See NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEP ANNOUNCES INITIATIVES TO FACILITATE BROWNFIELD REDEVELOPMENT at 96/114 (1996).

23. See generally Stacie A. Craddock, *A Call for Public Participation in State Voluntary Remediation Programs: Strategies for Promoting Public Involvement Opportunities in Virginia*, 30 U. RICH. L. REV. 499 (1996).

24. See Jane M. Kenny, *Six Month Report-Governor Christine Todd Whitman's Urban Strategy* (1996). See also NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PARTNERS IN REVITALIZATION: LINKING URBAN REDEVELOPMENT AND ENVIRONMENTAL RESOURCE PLANNING (NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY) at 1 (1994).



ing interaction with various community members by inviting interested persons to remediate contamination, usually on a voluntary basis.<sup>25</sup> Meetings and round table discussions are regularly held, during which stakeholders can air concerns, ask questions and voice suggestions.<sup>26</sup> This breeds trust and encourages sound ideas and solutions. By keeping potential "partners" well informed about site remediation issues, the DEP encourages more offers for privately funded voluntary cleanups.

New Jersey has had a "voluntary cleanup program" since the early 1990s (well before the term "brownfields" became popular), where persons could choose to participate in complete or partial site remediations.<sup>27</sup> Historically, that program has not focused exclusively upon "brownfields," but because it facilitates cleanup work in general, brownfield redevelopment has often been the result.<sup>28</sup> Prospective purchasers and developers want to make sound business decisions prior to investing in site remediations, and New Jersey's voluntary cleanup program provides for a staged, cautious "look-see-first" approach which can allow a person to assess a site and consider options prior to committing to a complete remediation in some cases.<sup>29</sup>

The voluntary cleanup program has been yielding over 1,500 New Jersey cleanups annually,<sup>30</sup> due in great part to the DEP's

25. See N.J. ADMIN. CODE tit. 7, § 26E (1997).

26. See PARTNERS IN REVITALIZATION, *supra* note 24.

27. Over thirty states have implemented voluntary cleanup programs or specific brownfields legislation which commonly focuses upon economics. See Richard J. O'Conner & LuAnn Pasciak, *Brownfields Perspective* (last visited Oct. 26, 1998) <<http://www.rfweston.com/allenv/BROWN/brown.htm>>. Whether a particular state chooses to improve its economic health and assist brownfield development by allowing for end-use standards (as New Jersey has done) or perhaps through accelerated remediation approvals by a state environmental protection agency, or financial help for innocent developers (again, New Jersey's program has those components), states are finding ways to address the problems caused by underutilized contaminated lands and to increase opportunities for brownfield redevelopment.

28. See *Voluntary Cleanup Program* (last modified July 27, 1998) <<http://www.state.nj.us/dep/srp/cas/volclean.htm>>.

29. See *id.*

30. As the Governor pointed out, New Jersey Department of Environmental Protection's cleanup agreements with private parties under

practice of allowing so many parties — including responsible parties in certain cases — to enter into voluntary "Memoranda of Agreement,"<sup>31</sup> the cornerstone of New Jersey's voluntary cleanup program. This oversight agreement, where a party who elects to undertake all or some remedial activities for a given site can enter into with the DEP, allows the volunteer to assume remediation responsibility one step at a time, as the Department oversees and approves the work.<sup>32</sup> In addition, the act of posting additional financial security will typically not be necessary pursuant to a Memorandum of Agreement,<sup>33</sup> therefore allowing more of a developer's funds to remain available for actual site redevelopment.

## 2. Remediation Standards Based Upon Site Use and Finality for Cleanups: Practical, Efficient and Predictable Brownfields Remediation

Even those fully prepared to voluntarily remediate contamination at a brownfield site may still have lingering concerns regarding the notion of finality of the cleanup process. Indeed, the remediator will wonder when or even if remediation responsibility will end. These questions can have a negative impact upon

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the Voluntary Cleanup Program have significant focus on the revitalization of brownfields. *See* Governor Christine Todd Whitman. Testimony Before a Hearing of the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment (March 5, 1997).

31. Voluntary cleanup programs vary from state to state, both with regard to the categories of qualifying sites, and with regard to the universe of parties permitted to enter into a State's "voluntary" program. For example, while a high priority hazardous waste site may qualify under New Jersey's brownfields program, it might not qualify in California. New Jersey has historically entered into Memoranda of Agreement with potentially responsible parties, but applicants who actually caused site contamination have not qualified under Pennsylvania or Colorado's "voluntary" cleanup program. *See* OFFICE OF TECHNOLOGY ASSESSMENT, *The State of the States on Brownfields: Programs for Cleanup and Reuse of Contaminated Sites* (June 21, 1995).

32. *See* *Voluntary Cleanup Program*, *supra* note 28.

33. *See* Revitalizing New Jersey's Brownfields (last modified June 3, 1998) <[http://www.state.nj.us/dep/srp/news/1998/9805\\_06.htm](http://www.state.nj.us/dep/srp/news/1998/9805_06.htm)>.

enthusiasm. The often-asked question of "how clean is clean," whether applied to a brownfield or to any other site, is no doubt critical; underlying that question is a call for cleanup standards for various environmental media.

Pursuant to the 1998 Brownfields Act, the DEP will be developing new remediation standards toward the goal of making certain "that the potential for harm to public health and safety, and to the environment, is minimized to acceptable levels, taking into account certain factors, including the intended use of the property . . . ." <sup>34</sup> Important to those who wish to cleanup a brownfield site and transform it into a new business site is how the site is currently used as well as the site's future planned use. The answers to these questions will help further the Department's goal of minimizing the number of unresolved issues before proposing administrative rules which set forth soil cleanup standards and other standards not yet established. The practice put into place by Assistant Commissioner Gimello and his directors calls for an exchange of ideas for standards between the Department and the regulated community. <sup>35</sup> It has been working well, and more discussions are underway. Meanwhile, many developers who, in the past, have desired to place engineering and institutional controls at a site (in lieu of digging up 100% of the site contaminants) have already obtained Department approval for their remediation plans, where site use will not prompt direct contact with contamination. <sup>36</sup> This type of flexibility brings about cost savings and more efficient cleanup projects for many brownfield sites. <sup>37</sup>

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34. N.J. STAT. ANN. § 58:10B-12(a) (West Supp. 1998).

35. See Diana Lasseter Drake, *The Reinvention of the Environmental Industry*, 11 BUS. NEWS N.J. 20, 21 (1998).

36. See, e.g., Tom Johnson, *Law Speeds Redevelopment of Urban Tracts*, STAR LEDGER, Jan. 7, 1998, at 14.

37. The use of engineering controls (such as a cap to contain contamination) and institutional controls (such as a Deed Notice filing to alert the public concerning site conditions and allowable land uses) are often part of site remediation efforts approved by the Department of Environmental Protection. Such controls address hazardous substances which must be left behind and can often be put into place at an affordable price, thereby encouraging voluntary remediations.

Remedial actions under the new statute will be tailored for: (a) "unrestricted use," (b) "restricted use", or (c) "limited restricted use," depending upon whether and to what extent, engineering or institutional controls will be used in a remediation.<sup>38</sup>

An unrestricted use remedial action will not require the use of any site controls to meet established standards; a limited restricted use remedial action will not require the use of engineering controls to meet standards but *will* require institutional controls; a restricted use remedial action will require the continued use of both types of controls in order to meet the necessary standards.<sup>39</sup>

The Department's Technical Requirements for Site Remediation<sup>40</sup> have already been encouraging an increased number of brownfield cleanup and redevelopment projects by providing a clear, step-by-step "cook book" type of approach that is easily understandable by consultants employed to conduct site assessments, investigations or remediations.<sup>41</sup> In fact, these administrative rules respond especially well to a developer's need for financial planning and predictability because they simplify the State's expectations and therefore streamline the remediation process.

## B. *The Statutory Framework In New Jersey*

### 1. An Evolution of Environmental Statutes

For the past three decades, New Jersey has been addressing sites through a progression of State laws designed to mitigate unacceptable risks posed by contaminants to public health, safety and the environment. Thus far, New Jersey has progressed through what can be termed several distinct "generations" of environmental statutes. By proceeding first through the experience of working to prevent contamination, and then later addressing the effects of already existing contamination, many lessons have been learned. Some New Jersey statutes offer a regulatory alternative through permits designed to limit or prevent contamina-

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38. N.J. STAT. ANN. § 58:10B-1 (West Supp. 1998).

39. *See id.*

40. *See* N.J. ADMIN. CODE tit. 7, § 26E (1997).

41. *See id.*

tion at the outset;<sup>42</sup> some statutes implement liability schemes or increase the availability of funding to address already existing contamination;<sup>43</sup> some of the more innovative laws maneuver and facilitate the market forces as a way to invite site cleanups.<sup>44</sup> In a way, New Jersey is now addressing the "big picture" through laws which blend cleanup concerns with real estate development as this State is becoming a leader through its history of legislative and regulatory experiences.<sup>45</sup>

The earliest generation of environmental statutes in New Jersey was mostly regulatory, imposing conditions upon commercial and industrial processes in an effort to prevent contamination by eliminating or minimizing negative environmental impacts of certain business operations. The Water Pollution Control Act<sup>46</sup> and the Solid Waste Management Act<sup>47</sup> are prime examples. These Acts had many positive impacts upon the State, mainly by alerting the regulated community to the necessity of conducting business operations in a new way. Yet, in time New Jersey felt that more was needed.

Less than one decade after enactment of the first generation of statutes geared toward preventing eruption of additional brownfields, the need for additional legislative efforts to address the State's already contaminated sites became obvious. It also became clear that there were not enough public funds to remedy all problems at all sites. Hence, the Legislature next adopted the Spill Compensation and Control Act,<sup>48</sup> which included a remedy against hazardous substance dischargers that owned contami-

42. *See, e.g.*, Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1 to -37.23 (West Supp. 1998) (penalizing those who discharge pollutants without a permit or in concentrations which exceed those allowed by permit).

43. *See, e.g.*, Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23a to -23.11p (West Supp. 1998) (forbidding discharge of hazardous substances).

44. *See id.* at § 58:10-23.11o.

45. *See* The Brownfield Act, N.J. STAT. ANN. § 58:10B-1 to -31 (West Supp. 1998).

46. N.J. STAT. ANN. §§ 58:10A-1 to -37.23.

47. N.J. STAT. ANN. § 13:19-1 (forbidding improper or unauthorized disposal, storage, transportation, or handling of hazardous wastes).

48. N.J. STAT. ANN. §§ 58:10-23.11a to -23.11e (West Supp. 1998).

nated sites, i.e. the ability to lien the property, which some may view as harsh.<sup>49</sup> However, no one can deny that the Spill Act has been very effective in remedying discharges of hazardous substances.

Although innocent land owners need not be concerned about being held liable under the Spill Act to the State for contamination merely flowing onto their land from another person's property,<sup>50</sup> the Act will not tolerate persons liable for contamination walking away from their cleanup responsibility.<sup>51</sup> Although the DEP has entertained requests by liable parties to perform their own cleanups (using their own contractors) which can allow them to control site remediation costs, the policy in this State is that polluters should pay for remediation.<sup>52</sup> The Spill Act, as amended by the 1998 Brownfields Act, continues today to act as a strong incentive to keeping New Jersey clean and turning New Jersey green.

In time, the Legislature also utilized economic concerns and forces of the marketplace to address contamination pursuant to the Environmental Cleanup Responsibility Act ("ECRA").<sup>53</sup> This statute required business owners and operators to remediate any contamination at industrial establishments which had utilized hazardous materials prior to selling, transferring, or closing down operations.<sup>54</sup> The idea was that those contaminated properties could not simply be left abandoned to decay as the owners and operators vacated. ECRA has been quite effective since 1983, both as a corrective device for past environmental problems as well as a preventative tool for the future. In an effort to further assure site remediations, amendments to ECRA were enacted in 1993, and the statute was then renamed the Industrial Site Recovery Act ("ISRA").<sup>55</sup> Today, although industrial establishments

49. N.J. STAT. ANN. § 58:10-23.11g.c(2).

50. See N.J. STAT. ANN. § 58:10B-12g(5),(6) (West Supp. 1998).

51. See Testimony of Governor Whitman, March 5, 1997.

52. See *Division of Responsible Party Site Remediation Oversees A Cleaner New Jersey, Site Remediation News* (last modified Sept. 2, 1997) <[http://www.state.nj.us/dep/srp/news/1997/9701\\_06.htm](http://www.state.nj.us/dep/srp/news/1997/9701_06.htm)>.

53. N.J. STAT. ANN. §§ 13:1K-6 to -35 (West 1991).

54. See *id.*

55. N.J. STAT. ANN. §§ 13:1K-1 to -15, -21, -33 (West Supp. 1998).

still can become a source of soil, ground water, and surface water contamination, ISRA is able to resolve many environmental problems, often before they can accelerate.

ISRA's positive effect upon brownfields cannot be denied. ISRA mandates that industrial establishments be remediated — or at least that a remediation commitment be put into place — before lands can transfer.<sup>56</sup> Hence, in great part due to ECRA/ISRA,<sup>57</sup> sellers and buyers find ways to work cleanup costs into their overall land sale strategy and other transactional costs before a new brownfield appears.<sup>58</sup>

## 2. "Brownfields" Statutes Enacted During the Nineties

For years before the term "brownfield" was coined, New Jersey has believed that real incentives are needed if more contaminated sites are to be cleaned up and recycled for reuse. Loans for cleanup, tax savings for developers and liability protection schemes for landowners are just some of the ways in which the legislature is currently inviting increased remediation and rede-

56. *Id.* at 9.

57. This Act, upon closing of operations at an ISRA site (or prior to property transfer), requires that owners or operators demonstrate that a site has been addressed and obtain a negative declaration, no further action letter, approval of a remediation work plan, or a remediation agreement from the Department of Environmental Protection. Once owners and operators follow the statutory cleanup procedure prior to transfer or closure, the state will verify completion. Then, contamination may sometimes be left onsite at concentrations exceeding minimum soil cleanup standards. However, engineering controls (such as a "cap"), or institutional controls (such as a "deed notice") must often be put into place to protect public health, safety and the environment. *See id.*

58. In many respects, ECRA/ISRA was the State's first "brown-field" statute. It certainly is oriented toward moving property sales as opposed to abandonment of dirty land. ISRA requires that sellers of industrial property prove that a site is free of contamination, or that the contamination is in the process of being remediated, before the property can be transferred. This can be very beneficial and comforting for a potential buyer/developer. *See* § 13:1K-6. Also, the law brings the property's condition into focus at a time when the parties are "cutting the deal" and a serious buyer may be willing to help finance the cleanup as a part of that deal. *See id.*

velopment pursuant to brownfield statutes. These new statutes are the State's most recent generation of environmental legislation.

In late 1995, when the Environmental Opportunity Zone Act<sup>59</sup> became law, the promotion of cleanup and reuse of sites located in "environmental opportunity zones" began. Because it encouraged acquisition of contaminated properties through various incentives (including special tax rebate exemptions), the Act worked quite well for some properties. The law also provided funding for projects located in certain zones, as well as various types of financial relief where a municipality held a tax sale certificate on a qualifying site.<sup>60</sup> The result of this early brownfields law was a degree of increased cleanup activity, along with a corresponding degree of growth for New Jersey cities. Yet, New Jersey saw that there were other contaminated sites in locations not covered by that Act. These areas were also in need of a new face; once again, the decision was that more was needed.

Another brownfield statute, the Municipal Landfill Site Closure, Remediation and Redevelopment Act, was enacted during 1996.<sup>61</sup> Under that legislation, those interested in executing redevelopment agreements with the State to develop municipal solid waste landfills could become entitled to a rebate of expenses associated with their landfill closure and remediation.<sup>62</sup> The law provides that reimbursement be derived from taxes generated at the redevelopment property.<sup>63</sup> Through these and other incentives for would-be developers, municipalities could request assistance for the cleanup of landfill sites in order to allow for new opportunities and additional revenues.

Also in 1996, the Urban Redevelopment Act was adopted, which appropriated additional redevelopment funds for site in-

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59. N.J. STAT. ANN. §§ 54:4-3.150 to -4.4 (West 1995). The legislation, sponsored by Senator Richard Bagger, provided for municipalities to designate certain areas as environmental opportunity zones, and tax exemptions for persons agreeing to remediate them.

60. *See* § 54:4-3.156.

61. N.J. STAT. ANN. §§ 13.1E-116.1 to -119 (West Supp. 1998).

62. *See id.* at § 13.1E-116.7.

63. *See id.*



vestigations, and reduced loan repayment rates.<sup>64</sup> However, the most noteworthy component of the New Jersey Urban Redevelopment Act was its liability protections for brownfield owners and operators in "qualifying" locations.<sup>65</sup> In many ways, that approach helped to set the stage for the current brownfield climate.

Finally, when the Brownfield Act was enacted in 1998, innocent developers, additional landowners, and various other persons conducting cleanups received expansive liability protections. These protections are more expansive than those under the New Jersey Urban Redevelopment Act, both with regard to the number of sites to which the protections applied, and the extent of the liability protection. For example, the new Act currently creates a major benefit for the innocent party. When the DEP issues a "no further action determination" to signify the conclusion<sup>66</sup> of a remediation at a potential redevelopment site, a "covenant not to sue" will then also be issued by this Department.<sup>67</sup> Under that covenant, the DEP will not force innocent covenant holders (or innocent successive land owners, operators, or tenants) to go back and perform additional remediation of contamination already addressed.<sup>68</sup> In sum, a no further action letter from the DEP will now provide non-labile parties with true cleanup final-

64. N.J. STAT. ANN. §§ 55:19-21 to -77 (West 1996).

65. The New Jersey Urban Redevelopment Act, sponsored by Senator Dick LaRossa, was in many ways a catalyst for later brownfield laws because it provided liability protections which can be important to those willing to buy into previously contaminated real estate. *See id.* at § 55:19-38. New Jersey's Spill Compensation and Control Act ("Spill Act") already contained a degree of lender liability protection, N.J. STAT. ANN. § 58:10-23.11g4, and also provided certain innocent landowners with protections, N.J. STAT. ANN. § 58:10-23.11g(d)2. Due to the statutory amendments that occurred in January 1998, innocent landowners can even receive third-party liability protection not only under the Spill Act but under State civil common law as well. N.J. STAT. ANN. § 58:10-23.11g. *See also* P.L. 1997, Ch. 278.

66. Sometimes, although written verification of the determination is issued, conditions must still be performed before the remediation can be considered by the DEP as complete. *See* § 58:10B-13.1 (West Supp. 1998).

67. *See id.*

68. *See id.*

ity. That finality, along with third-party liability protections, should prompt an ever-increasing number of cleanups, land purchases, and transformations of abandoned industrial property.

C. *Assistance From the Hazardous Discharge Site Remediation Fund*

In 1993, the Hazardous Discharge Site Remediation Fund was created pursuant to the Brownfield Act.<sup>69</sup> This Fund provides financial assistance to many municipalities, businesses, and persons with insufficient funds to complete site investigations and cleanups.<sup>70</sup> The DEP administers this source of cleanup money, and other State agencies act as either trust coordinators or assistants in performing reviews of loan applications. This fund is responsible for many of the State's brownfield successes because it has prompted redevelopment of properties once considered beyond repair.<sup>71</sup> Loans or grants from this Fund have been made available to persons who remediate sites pursuant to New Jersey's voluntary cleanup program, to municipalities who investigate properties owned by them through foreclosure or other means, to persons with statutory obligations to perform remediation who cannot obtain private financing for the work, and to "innocent" brownfield developers and landowners.<sup>72</sup>

The Fund can provide financial assistance for site assessments, investigations and remedial actions.<sup>73</sup> Although the completion of an actual site cleanup can represent the best evidence of the success of this Fund, another significant use of Fund monies has been the assistance with site investigations.<sup>74</sup> In fact, the Fund

69. See § 58:10B-4 (West Supp. 1998).

70. See *Site Cleanups Progress with Public Funds*, *Site Remediation News* (last modified Mar. 25, 1997) <<http://www.state.nj.us/dep/srp/news/1996/srn9608.htm>>.

71. See *id.*

72. See § 58:10B-20 (West Supp. 1998).

73. See § 58:10B-6 (West Supp. 1998).

74. See *id.* Providing financial help at early stages of site remediation, such as the investigation phase, can prove especially beneficial for brownfield sites. Once an investigation has been funded and conducted, developers, potential purchasers, and lenders alike can often glean a better idea as to the extent and nature of site contamination, allowing State and local governments as well as the investors to become

has financed millions of dollars worth of investigations.<sup>75</sup> For example, the investigation of the Trenton Champale site, the Saturn Chemical site in Lawrence Township, and the Cassidy and Sons Junkyard in Edgewater Park Township were all made possible due to the existence of this Fund. It is these investigations which have set the stage for further remediation and profitable development.<sup>76</sup>

One particularly noteworthy use of Fund monies is embodied in an agreement reached with Trenton's Department of Housing and Development for remediation of a property known as the Magic Marker site.<sup>77</sup> Contamination in the soil from lead and other metals once existed at that property, but because the Fund was available, innovative cleanup methods were employed and redevelopment can now be expected.<sup>78</sup> This success story is especially noteworthy because this site is located directly across from an elementary school.

*D.    The Department of Environmental Protection Has Its Own  
"Brownfield" Cleanup and Redevelopment Plan Through The "Publicly  
Funded" Cleanup Program*

The DEP uses public funds to conduct site remediations when parties responsible for site contamination are unknown, unwilling, or unable to perform or fund necessary cleanup work.<sup>79</sup> Nevertheless, public funds that originate from a variety of sources (including the New Jersey Spill Compensation Fund, bond monies, State revenues, corporate business tax, and, for certain sites, federally-funded programs) are scarce; therefore, the State wants to utilize these funds wisely.

Interestingly, the publicly funded program is no different than the DEP's other programs in terms of its dedication to the task of brownfield revitalization. One clear example of a "brownfield

aware of preferable and allowable uses for a site, and to assess the economic soundness of a cleanup and redevelopment.

75. See NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PUBLICLY FUNDED CLEANUPS SITE STATUS REPORT (1996).

76. See *id.*

77. Office of the Governor News Release, N.J., June 19, 1998.

78. See *id.*

79. See § 58:10B4-5(c).

strategy" employed by this program involved the remediation of a 200 acre site in Florence Township, Burlington County.<sup>80</sup> The Roebling Steel Company site was selected for cleanup by the publicly funded program in order to foster the site's return to "productive, profitable commercial use."<sup>81</sup>

#### E. Formation of "Brownfield" "Partnerships"

Partnerships are helping enormously in New Jersey to implement brownfields laws and policies that, in turn pave the way for new development. Whether the problem is a leaking underground storage tank, a gas or utility site, a junkyard, or a landfill, working relationships are this State's best tool for success. The success of these relationships has not gone unnoticed.<sup>82</sup>

Special DEP outreach methods not only make the jobs of remediators and developers easier, but encourage redevelopment. For example, the DEP involves itself with various brownfield task forces and other groups which meet to discuss risk-based programs.<sup>83</sup> Moreover, several years ago, the Department distributed a list of New Jersey's "Known Contaminated Sites," which is updated periodically.<sup>84</sup> That list in combination with an electronic site mapping system, designed to plot hazardous dis-

80. See *New Jersey Superfund Sites in the National Priorities List as of May 7, 1998* (last modified July 24, 1998) <<http://www.state.nj.us/dep/srp/bcr/superfnd.htm>> (listing sites such as the Roebling Steel Co. where remediation efforts have been completed).

81. See *generally Brownfield Cleanups Succeed Across the Garden State* (last modified Sept. 8, 1998) <<http://www.state.nj.us/dep/srp/ber/succeed.htm>> (indicating that economic redevelopment coupled with environmental cleanup has resulted in the rebirth of industrial and commercial properties).

82. A 1996 PSE&G/NJDEP/MGP Streamlining Team Excellence Award resulted from the positive efforts by the State to work with the regulated community in a cooperative fashion toward common goals.

83. See *Workshop Inaugurates Jersey City Pilot* (last modified Sept. 9, 1998) <<http://www.state.nj.us/dep/srp/bcr/jerseycity.htm>>.

84. See *Known Contaminated Sites-NJ Listings September 1997* (last modified Jan. 13, 1998) <<http://www.state.nj.us/dep/srp/kcs-nj/kcs-nj.htm>>; see also *About the Known Contaminated Sites-NJ Listings September 1997* (last modified Jan. 5, 1998) <<http://www.state.nj.us/dep/srp/kcs-nj/about.htm>>.

charge sites and site information, should aid developers in selecting new brownfield project sites. Finally, by making departmental bulletins, brochures and newsletters available, the DEP ensures that more well-informed parties can gear themselves up to address sites.

It is the DEP's view that effective cleanup and development of contaminated sites warrants the coordination of efforts among remediating parties and governmental officials as well as investors, lenders and other persons with a significant stake in the outcome. In fact, the DEP has come to believe that partnerships are the major solution to the problem of brownfield avoidance.

All "partners" to a brownfield project can assist in some way with cleanup or construction activities, and partners can benefit from the others' experiences and knowledge. This cooperation often allows a sale to go through on time or a cleanup agreement to be executed which would otherwise not have taken place. In addition, numerous entities can share site-specific information in order to help move a project along. State or local agencies will usually have access to site maps or site inventories. Regulators on every level can provide the guidance, approvals and permits necessary for remedial or other activities associated with redevelopment projects. Local and State officials can also provide zoning and property tax information.

Relationships have surfaced between the private sector and the DEP. For example, the Site Remediation Program at the Department and four other state agencies were directed by the Legislature to partner with six public members to form a Brownfields Redevelopment Task Force.<sup>85</sup> Also, the Public Service Electric & Gas Company and the Department's Site Remediation Program worked as a team in developing an approach to investigating and cleaning up gas sites.<sup>86</sup> Further studies are underway, but the partnership has been developing a generic work-plan for investigating approximately forty sites.

Under a similar partnership approach, a petroleum facility project has been established to assist the DEP with closure and upgrade issues concerning regulated petroleum underground

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85. See § 58:10B-23 (West. Supp. 1998).

86. See *id.*

storage tanks.<sup>87</sup> Persons interested in remediating contaminated sites containing underground storage tanks also formed a special "Cooperative Venture" intended to enhance relationships between underground storage tank owners or operators and the Department.<sup>88</sup> Under that Venture, the Site Remediation Program and a tank owner (or operator) have had the opportunity to reach mutual agreement upon investigation and remediation schedules based upon site-specific conditions and risks to environmental receptors.<sup>89</sup> This type of relationship encourages frank communications and an increased understanding of tank regulations and can help achieve more efficient site cleanups. It is also anticipated that where storage tank cases can be handled quickly and efficiently, precious State resources can be preserved.

The DEP and the State Attorney General's Office have also used partnership approaches to resolve brownfield issues on a case-by-case basis. This has been achieved by having the DEP enter into several innovative prospective purchaser agreements that contain liability protections similar to those passed by the Legislature in January 1998.<sup>90</sup> The State has been hailed for its efforts in effectuating reform to site remediation through brownfield approaches.<sup>91</sup> Additionally, these two Departments have

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87. See Doug Burry, *Outreach Effort to Help UST Owners/Operators Comply With 1998 Deadlines*, SITE REMEDIATION NEWS Aug. 1996, Vol. 8 Num. 2 (last modified Mar. 25, 1997) <<http://www.state.nj.us/dep/srp/news/1996/srn9608.htm#Article03>>.

88. See *id.*

89. See *id.*

90. See The Brownfield Act, N.J. STAT. ANN. § 58:10B-1 to -31 (West Supp. 1998).

91. For example, in 1996, the Attorney General's Office, the Department of Environmental Protection, and certain private developers and prospective purchasers negotiated a cleanup agreement (Prospective Purchaser Agreement) containing covenants not to sue for pre-acquisition site contamination. In that case, private dollars were able to be made available for real estate purchase, cleanup, and redevelopment. The developer's liability fears were reduced, and a City can now enjoy a new shopping mall. The environment will also benefit by the resulting cleanup of that landfill site. The agreement, which was the first of its kind for New Jersey, was approved by the United States District Court as a Judicial Consent Decree. Certain liability protections included in that Agreement also appeared later in several other Prospec-

been credited by the National Association of Attorney Generals for breaking new ground in brownfield redevelopment with their continuing focus on innovative approaches to encourage redevelopment.<sup>92</sup>

New Jersey lawmakers and regulators clearly believe in providing people with the tools to remediate contaminated sites into profitable businesses. Their effort can be seen in the redevelopment of movie houses, sports complexes and shopping malls in all twenty one counties. For example, in Camden County, a new outdoor musical theater sits, where a contaminated rail yard was once located, and a sports arena now provides recreation for Mercer County at the site of a formerly underutilized industrial property.<sup>93</sup> Other successful partnerships have resulted in several senior citizen housing projects, including one in Hunterdon County at a former coal gasification plant and another in Monmouth County at an abandoned auto shop.<sup>94</sup> When the public and private sectors cooperate and form bonds geared toward the common goal of rebuilding brownfields, not only can a better environment result, but also a stronger economy comes about through real estate redevelopment.

### III. MAJOR EFFECTS OF THE 1998 BROWNFIELD AND CONTAMINATED SITE REMEDIATION ACT

In support of New Jersey's policy of having polluters pay for their actions or inactions that result in site contamination, the provisions from the New Jersey Spill Compensation Act (now reflected in the Brownfield Act) continue to impose strict joint and several liability upon persons "in any way responsible" for discharges of hazardous substances.<sup>95</sup> That scheme, which remains

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tive Purchaser Agreements, including one entered into by Vineland City and another by Hackensack Meadowlands Development Commission. The shopping mall agreement included contribution protection pursuant to CERCLA, Section 9613.

92. See NAAG, CREATING PARTNERSHIPS FOR A SUSTAINABLE FUTURE: SUCCESS STORIES, ADDENDUM TO ENVIRONMENTAL SUMMIT REPORT (1997).

93. See *Completed Brownfield Project Examples* (last modified Mar. 14, 1997) <<http://www.state.nj.us/dep/srp/bcr/examples.htm>>.

94. See *id.*

95. N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1998).

well-suited to the State's polluter-pay policy, was left undisturbed in 1998 when the Brownfield Act amended the Spill Act. However, because the broad Spill Act liability net can inadvertently catch persons other than responsible parties, the 1998 Legislation differentiated between liable and non-liable parties, allowing the latter to worry less about liability exposure. It is hoped that this will lead to more site acquisitions and cleanups.<sup>96</sup> Indeed, liability protections concerning past site contamination can go a long way to help an innocent purchaser or innocent potential investor retain interest in a brownfield project. The Legislature recognized the importance of these provisions to various stakeholders.

Since 1993, lenders who merely lend funds or hold a security interest in connection with polluted property have been shielded to a great extent from incurring Spill Act liability.<sup>97</sup> Thus, many banks and lending institutions have been willing to provide financing for cleanups or redevelopment projects. Now, the new liability protections embodied in the Brownfield Act enhance that willingness as the State continues to encourage new loans and investments in contaminated property.

Since September 14, 1993, New Jersey law has also helped landowners through what is known as the "innocent purchaser" defense. Purchasers of a contaminated property may assert such a defense when pre-existing contamination is discovered *after* property acquisition, provided that the owner did not cause the contamination and engaged in a "due diligence" site assessment prior to purchase.<sup>98</sup> However, the defense seemed difficult to obtain.<sup>99</sup> The defense required that, at the time a person acquired

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96. *See id.*

97. *See* N.J. STAT. ANN. § 58:10-23.11g(5) (West Supp. 1998).

98. *See* N.J. STAT. ANN. § 58:10-23.11g(d) (West Supp. 1998).

99. The defense has, in the past, been termed by some members of the regulated community as the "guilty purchaser defense" because, if a pre-acquisition site assessment leads to discovery of contamination, the owner had to address it. Even though this is still the case, once a cleanup is conducted, the protections are greatly expanded. In fact, future "innocent purchasers" can receive certain third party liability protection before they even initiate a cleanup. N.J. STAT. ANN. §§ 58:10-23.11g.d(2)(e), 58:10-23.11g.f.



the contaminated property, the person did not know that it was contaminated.<sup>100</sup> In response, the 1998 law allows liability protection from third parties for innocent purchasers who learn about contamination even prior to acquisition but perform the necessary remediations.<sup>101</sup> In some cases, an innocent purchaser can even gain those protections before the investigation and cleanup activities are commenced.<sup>102</sup>

It is anticipated that liability protections and other features of the 1998 statute, including special tax rebate incentives, reimbursement of developers' remediation costs by the State, and finality of cleanups pursuant to the Department's covenant not to sue, will result in an increased number of land acquisitions, remediations and economically profitable development projects.

#### IV. CONCLUSION

Major strides have been made in New Jersey to reclaim brownfields.<sup>103</sup> The Department of Environmental Protection, the Legislature, the Office of the Attorney General, and all other "partners" in this State are firmly committed to revitalization. The public and the private sectors have demonstrated good sense, flexibility and sensitivity toward each other, applying themselves to real-life issues faced whenever historical site contamination exists.

Through a procession of statutes, technical regulations, case-by-case cleanup agreements, communication, other approaches geared toward inviting increased efforts and private funding to resurrect rather than avoid brownfields, New Jersey has been moving steadily toward increased economic prosperity and environmental health. Now, with a comprehensive brownfields statute to direct an already successful set of initiatives by the DEP, all of the State's partners in revitalization are becoming leaders, not only in site remediation issues, but in land reuse strategies as well. Under this leadership, it is anticipated that industrial and

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100. See N.J. STAT. ANN. § 58:10-12.11g.d(2)(b)(i).

101. See N.J. STAT. ANN. § 58:10-23.11g.d(2)(e).

102. See N.J. STAT. ANN. § 58:10-23.11g.f.

103. See Robert Cash, *Will Liability Protection Spur Brownfield Redevelopment?*, 154 N.J.L.J. 260 (Oct. 26, 1998).

commercial properties will no longer be abandoned and that brownfield avoidance will be transformed into brownfield resurrection.

Interestingly, the State's Governor pointed out in her 1998 Inaugural Address that preservation of open spaces such as forests and farmland can enhance the quality of life in New Jersey because it will result in cleaner air and water, more beautiful recreational areas, increased availability of fresh and healthy produce, and tourism dollars to communities.<sup>104</sup> With the current laws like the 1998 Brownfield and Contaminated Site Remediation Act, polluted sites will become more attractive for redevelopment which will in turn allow New Jersey's open spaces to remain green.

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104. See Inaugural Address of Governor Christine Todd Whitman (Jan. 20, 1998).

